

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
November 14, 2007 Session

**STATE OF TENNESSEE v. JOE M. GILBERT**

**Direct Appeal from the Circuit Court for Williamson County**  
**No. II-CR03962 Timothy L. Easter, Judge**

---

**No. M2007-00260-CCA-R3-CD - Filed April 8, 2008**

---

Joe M. Gilbert, the defendant, was convicted by a jury of aggravated abuse of a child under six years, a Class A felony. The defendant was sentenced as a violent, standard offender to fifteen years at 100%. On appeal, the defendant alleges that: (1) the evidence was insufficient to support the conviction; (2) the trial court erred in permitting an expert witness to present his conclusions and opinions of the victim's injuries; (3) the trial court's numerous evidentiary errors deprived the defendant of a fair trial; and (4) prosecutorial misconduct denied the defendant a fair trial. Our review has failed to identify any reversible error, and we hereby affirm the judgment of conviction.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Mark L. Puryear, III, Franklin, Tennessee, for the appellant, Joe M. Gilbert.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Ronald L. Davis, District Attorney General; and Derek K. Smith, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The two-count indictment against the defendant charged him with aggravated child abuse resulting in serious bodily injury to his then-seven-week-old son. The second count was of abuse to the infant by neglect. The jury acquitted the defendant on the second count and convicted the defendant as charged on the first count. Accordingly, the facts, as summarized, are those most favorable to the prosecution's evidence. The State proceeded on the theory that the defendant's son was the victim of "shaken baby syndrome" inflicted by the defendant.

The defendant's ex-wife, Terri Gilbert, testified that on the date of the victim's injuries, December 9, 2004, the defendant worked part-time on weekends at a golf course. During the work

week days, the defendant took care of Zachary, the victim, and Ms. Gilbert took their then-two-year-old daughter to a day care center. On December 9, the defendant called Ms. Gilbert at work and told her he had fallen while holding the victim and thought that the victim might have hit his head. The defendant told her that the victim had lost consciousness but was revived by the defendant's CPR efforts. Ms. Gilbert urged the defendant to call a doctor. The defendant called Ms. Gilbert after he had called Harpeth Pediatrics. The defendant assured her that the nurse at Harpeth Pediatrics had said that the victim should be watched but, in the absence of twitching or other unusual behavior, there was no immediate concern. Ms. Gilbert returned home at 6:00 p.m. and examined the victim. She noticed twitching in his eyes and limbs. Ms. Gilbert took the victim to Williamson Medical Center, and he was then transported by ambulance to Vanderbilt Hospital. The victim was placed in the pediatric intensive care unit for one week and was later moved to a room for a week. He was discharged after being fitted with a feeding tube, which was utilized for nine months. Ms. Gilbert stated that, although the victim was nineteen months old at the time of trial, he was not developing on a normal basis. The victim only began crawling at sixteen months and could not pull up to his feet, stand, or walk. Ms. Gilbert and the defendant were divorced prior to the defendant's trial.

Lisa Albonetti testified that she was a registered nurse employed at Harpeth Pediatrics. Her duties involved supervision of seven other nurses and serving as the telephone triage nurse. As a triage nurse, she was trained to identify potential problems by asking appropriate questions and to give necessary precautions or referrals. Ms. Albonetti recalled talking with the defendant on December 9. The defendant told her that he had been feeding the victim a bottle when he got up in response to his telephone ringing. The defendant tripped over their dog and fell while holding the victim. After relating these events, the defendant then essentially was silent. In response to Ms. Albonetti's questions, the defendant denied that the victim hit his head, lost consciousness, vomited, or ceased breathing. She explained symptoms for the defendant to watch for and instructed him to call back if any of the symptoms surfaced.

Dr. Ida Yared, a licensed pediatrician who, in addition to her practice, also teaches medical students, testified that she was a member of the Vanderbilt Pediatric Care Team. The Care Team is made up of pediatricians and includes social workers who evaluate children suspected of non-accidental injury. On December 9, Dr. Yared examined the victim, discussed his injuries with other treating physicians, and examined x-ray findings. Dr. Yared also spoke with the defendant. The defendant told her that he tripped over the dog when he got up to answer the telephone. The defendant stated he was carrying the victim when he fell and, in falling, may have hit the chair. The defendant did not say he had shaken the victim but said he had "wiggled" the victim during the victim's distress. Dr. Yared testified that, based on CT Scan and MRI imaging, the victim had extensive injuries that were not consistent with the accident described by the defendant. The tests showed bleeding in areas around the brain and the appearance of bruising in some areas of the brain. The victim also suffered retinal hemorrhages and seizure activity. Dr. Yared opined that the extensive injuries received would not have resulted from the fall as described by the defendant. She testified that, to a reasonable degree of medical certainty, the injuries were caused by vigorous shaking of the victim which caused the victim's head to suddenly accelerate and then decelerate. Such motion causes tearing of small veins attaching the brain and skull and consequential bleeding.

Dr. Yared stated that these injuries can occur in the absence of shaking and gave examples of an automobile accident or a “very dramatic fall.” She stated that she was “one hundred percent certain” that the victim’s injuries did not relate to the victim’s premature birth. Dr. Yared stated that, among victims of Shaken Baby Syndrome, there is a 25% mortality rate and that 50% of survivors will have some significant impairment such as paralysis, delayed development, or blindness.

Dr. Jennifer Myers, who had been the victim’s pediatrician at Harpeth Pediatrics, testified that the victim was born at thirty-five weeks, was treated for a Group B strep condition, and was sent home after ten days in the hospital. An ultrasound at that time showed the victim to be normal. Dr. Myers had seen the victim on five occasions since his injuries on December 9, 2004. She noted that he was not visually tracking objects or blinking. The victim’s developmental skills were significantly delayed. At age nine months, he had poor truncal strength, his head “lagged” if picked up. At the age of twelve months, the victim could not pick up small objects and was not creeping or crawling. She stated that the victim will probably have a learning disability and possibly may never walk.

Dr. Deron Sharpe, a specialist in pediatric neurology at Vanderbilt Medical Center, became involved in the victim’s treatment due to the seizures. Dr. Sharpe testified that the hemorrhaging of the brain can exert pressure and can cause continuing injury. For treatment and to prevent secondary injury, the victim was given phenobarbital to create a medically-induced coma. In explaining Shaken Baby Syndrome, Dr. Sharpe testified that shaking a baby’s body can cause the head of the baby to acquire a high velocity due to the “relatively floppy neck” of infants. This creates internal injuries due to nerves within the brain pulling apart, often accompanied by subdural, epidural, or subarachnoid hemorrhages and retinal hemorrhages. These internal injuries are disproportionate to the traumatic injuries exhibited on the outside of the head. Dr. Sharpe stated that, in his opinion, the victim’s injuries were caused by shaking. He further opined that it caused a substantial risk of death and that the victim will likely suffer from neurological impairments. Relying on statistics, Dr. Sharpe stated that these impairments could include mental retardation, severe behavioral manifestations as a teenager, motor deficits, epilepsy, and visual impairment.

Detective Steve Cretin of the Spring Hill Police Department was contacted by a social worker at Vanderbilt Medical Center on December 10, 2004. He spoke with the victim’s parents separately at Vanderbilt. The defendant told Detective Cretin that he had fallen over the family dog while holding the victim. The defendant said the victim began crying, and he placed the victim on the changing table to examine him for injuries. The victim began vomiting from the mouth and nose and stopped breathing. The defendant said he was able to revive the victim by using CPR. After this, the defendant carried the victim to a staff meeting at his part-time employment, Kings Creek Golf Club. When the victim showed signs of agitation, the defendant left the staff meeting and returned home. The defendant then called his wife and told her about the falling incident. The defendant told Detective Cretin that he had called a nurse at Harpeth Pediatrics and related the events, including the vomiting and unconsciousness of the victim. The defendant said the nurse advised him to watch for any twitching and, if seen, to take the victim to the emergency room.

On December 14, Detective Cretin, with Detective Adrian Breedlove, interviewed the defendant again, utilizing DVD recording equipment. The redacted interview was shown to the jury. The defendant first related how he had fallen while holding the victim. The defendant said he had a staff meeting at his place of employment at 10:00 a.m. He stated that he rose from a chair in response to either the telephone or microwave oven signal. He fell over the dog, then against the chair, finally to the floor. The victim began to cry loudly. The defendant placed him on the changing table, and the victim began vomiting from his nose and mouth. The defendant cleaned the vomit using a suction bulb, but the victim stopped breathing and became limp. The defendant revived the victim using CPR and cleaned him. He said the victim seemed alert, and he dressed him and went to the staff meeting. He stayed only about five minutes due to the victim's "fussing" noises. The defendant said he called his wife, who urged him to call their doctor. He spoke with a nurse, Lisa, at Harpeth Pediatrics. The defendant said he related the victim's episode of vomiting and loss of consciousness. The defendant said he fed the victim about three times that afternoon, and the victim slept intermittently. Ms. Gilbert returned home at six that afternoon. She noticed the victim twitching and carried him to Williamson County Hospital emergency room. The victim was then transported to Vanderbilt Medical Center by ambulance.

In response to the detectives' questions, the defendant admitted that, in December of 2004, a lack of income had been stressful on his household as his wife had only recently obtained employment. After more confrontational questioning, the defendant admitted that he was scared. The defendant admitted that he shook the victim but denied that it was out of anger. He said that he shook the victim to try to revive him from unconsciousness. The defendant said he panicked and may have shaken the victim for half a minute. The defendant insisted that he had fallen with the victim and that he shook him afterwards. When asked if the shaking took place on the floor, the defendant responded:

No. He was crying. I picked him up trying to pacify him, he was crying more and more and more and more, and then I shook him. And then I shook him again after he was unconscious just trying to revive him. And then I got my wits together enough to save him.

The defendant said that he lied about not shaking the victim and explained as follows: Well, the fact that I shook him after we fell, you know, he wouldn't stop crying and I shook him and that's what made him get sick and lose his breath and I ended up having to do all the other stuff to get him back and shaking him in between too.

At another point in the interview, the defendant stated that he shook the victim while holding him by his feet. He said that the victim's head "flopping back and forth" concerned him.

Dax Dunn, a pediatric optometrist, testified on the defendant's behalf. He stated that he conducted a routine exam on the victim on November 9, 2005. He did not detect any signs of retinal hemorrhaging nor signs of trauma to the victim. On cross-examination, he admitted that retinal hemorrhaging eleven months before should have been resolved at the time of his examination. He

further stated that he could not state whether or not the victim had suffered from Shaken Baby Syndrome.

The defendant testified at trial and again related that he fell while holding the victim and had to revive him from unconsciousness. The defendant insisted that he did not knowingly or intentionally cause the victim's injuries. On cross-examination, the defendant accepted responsibility for the victim's injuries sustained while he was in his care. The defendant further stated that he must have shaken the victim but did not recall how it happened.

### Sufficiency of Evidence

The defendant contends that the evidence was insufficient to support the jury's conviction of knowing aggravated child abuse. The defendant relies on his testimony that the injuries to the victim were accidental and also attacks the admissibility of expert testimony which is more fully developed in the defendant's second issue.

Our standard when reviewing a sufficiency challenge is "whether, considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense charged beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999). "A guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory." State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and this court does not re-weigh or re-evaluate the evidence. Id. Nor may this court substitute its inferences drawn from circumstantial evidence for those drawn by the trier of fact. See State v. Carruthers, 121 S.C. 2600, 35 S.W.3d 516, 557-58 (Tenn. 2000). A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, and, on appeal, the defendant has the burden of illustrating why the evidence is insufficient to support the verdict rendered by the jury. Carruthers, 35 S.W.3d at 557-58; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). In contrast, the State on appeal is entitled to the strongest legitimate view of the trial evidence and all reasonable and legitimate inferences which may be drawn from the evidence. See Carruthers, 35 S.W.3d at 557-58; Hall, 8 S.W.3d at 599; Bland, 958 S.W.2d at 659. The standard of appellate review is the same whether the conviction is based upon direct or circumstantial evidence. Carruthers, 35 S.W.3d at 557-58; State v. Vann, 976 S.W.2d 93, 111 (Tenn. 1998).

Our review of the record leads us to conclude that the evidence does support the defendant's conviction of aggravated child abuse beyond a reasonable doubt. The elements of aggravated child abuse are: (1) knowingly, other than by accidental means; (2) abusing a child under eighteen years of age; and (3) either: (a) a deadly weapon is used; or (b) the abuse causes serious bodily injury. Tenn. Code Ann. § 39-15-402. Child abuse, in pertinent part, is defined as knowingly, other than by accidental means, treating a child under eighteen years of age in such a manner as to inflict injury. Tenn. Code Ann. § 39-15-401(a).

Dr. Ida Yared testified that the victim's injuries were inconsistent with an accidental fall as described by the defendant. She said, however, that the injuries were consistent with those of a shaken infant. Dr. Deron Sharpe expressed his opinion that the victim's injuries were the result of having been shaken.

The victim's debilitating injuries are well documented and undisputed by the testifying pediatricians. Not only was the victim already seriously developmentally delayed at the time of trial, his prospects are extremely poor. The victim's prognoses, mentally and physically, portend extended suffering from the injuries sustained in this incident.

The defendant, in his interview, admitted that he shook the victim on more than one occasion, at one time while holding the victim by his feet. The defendant said that he panicked after falling with the victim and shook the victim when he continued to cry and did so again after the victim lapsed into unconsciousness. These admissions were sufficient to confirm the doctors' opinions concerning the cause of the injuries.

In his testimony at trial, the defendant acknowledged his responsibility for the injuries the victim received while in his care. However, he claimed an inability to recall shaking the victim. The defendant's conflicting statements in the interview and his trial testimony posed the need for a factual determination. The jury chose to determine that the defendant's actions were knowing rather than accidental. We conclude that their determination was a rational choice, unrebutted by a preponderance of evidence to the contrary. Accordingly, we conclude that the evidence was sufficient to support the defendant's conviction.

#### Dr. Sharpe's Testimony

The defendant contends that the testimony of Dr. Deron Sharpe was erroneously admitted. The State argues that the defendant has waived the issue for appellate purposes.

The defendant's contention is that the trial court acted arbitrarily and abused its discretion by qualifying Dr. Sharpe as an expert pursuant to Tennessee Rule of Evidence 702 and 703. The defendant also claims that the trial court failed to determine if the testimony was relevant.

The appellate record contains a motion in limine filed by the State, requesting a pretrial determination of the admissibility of medical expert witnesses. The record does not contain an order concerning the motion's outcome or a transcript of the hearing. The fact that several medical experts, including Dr. Sharpe, testified leads to an assumption that their status as experts was established and that their testimony was admitted. We cannot assume to the contrary based on an incomplete record. The defendant, as the appellant, has the burden to provide an adequate record for appellate review. Tenn. R. App. P. 24(b); State v. Taylor, 992 S.W.2d 941, 944 (Tenn. 1999). In the absence of a complete record bearing on a challenged issue, we must presume that the trial court's determination was supported by the record. See State v. Draper, 800 S.W.2d 489, 492 (Tenn. Crim. App. 1990).

The trial transcript of Dr. Sharpe's testimony reveals that the defendant interposed an objection to Dr. Sharpe's testimony based on his study of medical literature by other physicians concerning shaken baby injuries. The defendant's first objection was as follows:

Prosecution: When you say extreme velocity of this acceleration and deceleration, what do you mean by that? Give us an example of how extreme this velocity would have to be.

Dr. Sharpe: Well – what I'll say is this is not work that I personally have done, what – looking --

Defense Counsel: I would object then, Your Honor.

The Court: Overruled. Go ahead.  
What is this based on Sir? What you're about to testify, what's it based on?

Dr. Sharpe: What other physicians have published.

The trial court admitted the testimony. Shortly thereafter, the following exchange occurred:

Prosecution: Sure. Doctor, can you say to a reasonable degree of medical certainty, based upon your review of Zachary Gilbert, that his injuries were the result of Shaken Baby Syndrome, as lay people commonly call it?

Dr. Sharpe: Yes.

Prosecution: Doctor, can you say to a reasonable degree of medical certainty that this injury resulted in a substantial risk of death?

Dr. Sharpe: Yes.

Prosecution: Did it?

Dr. Sharpe: Did it result --

Prosecution: Result in a substantial risk of --

Defense Counsel: I would make the same objection, Your Honor.

The Court: Excuse me?

Defense Counsel: As to what he's basing his opinion on; I mean, others --

The Court: Ladies and gentlemen, I think sometimes during a trial it's helpful for the court to give a preliminary instruction, and I think I'll do so at this point regarding the testimony that you're hearing right now.

During the trial you may hear testimony from what's called an expert witness, who will describe as an expert in the field of a particular area.

The rules of evidence provide that if scientific, technical or other specialized knowledge might assist you in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by reason of special knowledge, skill or experience may testify and state his or her opinions concerning such matters, and give reason for that testimony.

Merely because an expert gives an opinion or expresses an opinion does not mean that you are bound to accept that opinion. The same as with any other witness; it's up to you to decide whether you believe the testimony and choose to rely upon it.

Part of that decision will depend upon your judgment about whether the witness's background or training and experience is sufficient for the witness to give the expert opinion that you're hearing.

You must also decide whether the witness's opinions are based on sound reasons, judgment and information.

So the objection is overruled.

It's also noteworthy that the defendant did not include in either the motion for new trial or amended motion for new trial this specific issue, that the trial court acted arbitrarily and abused its discretion in admitting Dr. Sharpe's testimony. The motions for new trial instead alleged that the challenged testimony was speculative and based on other medical literature.

For the foregoing reasons, we conclude that the defendant waived this issue for appellate review.

#### Evidentiary Issues

The defendant next asserts that the trial court erred in the admission of certain evidence that cumulatively deprived the defendant of a fair trial.

Rulings on the admissibility of evidence are largely within the sound discretion of the trial court, and, on appellate review, a trial court's ruling to admit or exclude evidence will not be disturbed unless it appears that such a ruling amounts to an abuse of discretion. State v. Dubose, 953 S.W.2d 649, 652 (Tenn. 1997). “[A]n appellate court should find an abuse of discretion when it appears that the trial court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.” State v. Stevens, 78 S.W.3d 817, 832 (Tenn. 2002) (quoting State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997)).

The defendant first objects to a portion of the defendant's interview by Detectives Cretin and Breedlove wherein the defendant said, “I mean, about the shaking part and a couple of other things I was lying about.” The defendant objects to this because it followed a portion redacted from the interview video and transcript in which there was a reference to a “machine” utilized by the detectives that was not a polygraph but, as described in the defendant's brief, “similar to a polygraph.” The interview video and transcript were redacted, with consent by the State and the defendant, so no mention of the “machine” was heard by the jury. In our view, the challenged statement was merely the defendant's admission of having lied when he previously denied shaking the victim.

The defendant also claims error by the trial court in admitting the redacted transcript of the defendant's interview to be entered as evidence and provided to jurors during their deliberation. The defendant contends that this “placed an undue weight and greater amount of significance on this evidence.” The only authority the defendant cites in support of his argument is State v. Thomas, 158 S.W.3d 361, 396 (Tenn. 2005). The defendant's reliance is misplaced. The Thomas court held it was not an abuse of discretion for the trial court to refuse to allow the jury's request during deliberation for the transcript of one witness's testimony. Thomas did not establish a rule of blanket prohibition against exhibits being reviewed by deliberating juries, whether requested or not. It merely held that the denial, in that instance, was not an abuse of discretion.

The standard for allowing jury review of any evidence, whether exhibits or testimony, is within the discretion of the trial court. See State v. Jenkins, 845 S.W.2d 787, 793 (Tenn. Crim. App. 1992). “[A]n appellate court should find an abuse of discretion when it appears that the trial court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.” State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997). We conclude that the instant allowance of jury review was not an abuse of discretion.

The defendant next asserts that Dr. Yared's testimony concerning an explanation of how the victim could have been injured was improperly admitted as it was based on speculation. The defendant focuses on the word “probably” in the following exchange:

Prosecutor:	Could you demonstrate for the jury sort of physically how Shaken Baby Syndrome – that would result in these sorts of injuries to Zachary, how it would take place?
-------------	--

Dr. Yared:                      Probably --

Defense Counsel:        Your Honor, I object; this is just purely based on speculation,  
Your Honor, based on her prior testimony.

The Court:                      Overruled.

The witness was interrupted in her answer, and we do not presume from this word that the witness was indulging in speculation. Placed in context with the remainder of her testimony, it does not indicate speculation but, to the contrary, was based on her objective observations and past cases of persons who had admitted shaking infants.

We conclude that the defendant was not deprived of a fair trial by the alleged evidentiary errors.

#### Prosecutorial Misconduct

In his final issue, the defendant alleges that the prosecutor, in opening and closing statements, made inflammatory statements, unsupported by the evidence. The defendant alleges that these statements deprived the defendant of a fair trial. The State responds by alleging that the defendant forfeited his appellate rights by failing to make contemporaneous objections.

After our review of the record and particularly the opening and closing arguments of the State, we note that the defendant raised no contemporaneous objection in either phase of argument. We are not required to grant appellate relief to “. . . a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.” Tenn. R. App. P. 36(a); State v. Adler, 71 S.W.3d 299, 302 (Tenn. Crim. App. 2001); State v. Thompson, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000). Accordingly, we conclude that the defendant effectively waived this issue for appellate purposes.

#### Conclusion

After review, we conclude that no reversible error is contained in the record and affirm the conviction.

---

JOHN EVERETT WILLIAMS, JUDGE